

*Before the*  
FEDERAL COMMUNICATIONS COMMISSION  
**Washington, DC 20554**

In the Matter of	)	
	)	
Digital Audio Broadcasting Systems And	)	MM Docket No. 99-325
Their Impact on the Terrestrial Radio	)	
Broadcast Service	)	
	)	
	)	

**REPLY COMMENTS OF  
ALLIANCE FOR BETTER CAMPAIGNS, AMERICAN FEDERATIONS OF  
TELEVISION AND RADIO ARTISTS, BENTON FOUNDATION, CAMPAIGN LEGAL  
CENTER, CENTER FOR CREATIVE VOICES IN THE MEDIA, CENTER FOR  
DIGITAL DEMOCRACY, CENTER FOR GOVERNMENTAL STUDIES, COMMON  
CAUSE, NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, NEW  
AMERICA FOUNDATION, OFFICE OF COMMUNICATION OF THE UNITED  
CHURCH OF CHRIST, INC., PROMETHEUS RADIO PROJECT**

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## SUMMARY

The coalition of public interest organizations represented in these comments (“Public Interest Coalition” or “Coalition”) commends the Commission for its forward-thinking *FNPRM* and proactive exploration of public interest obligations for digital audio broadcasting. The Coalition focuses these reply comments on two over-arching themes: 1) Public interest obligations that exist now should also apply to any other service a broadcaster chooses to provide with its new DAB capabilities; 2) The more benefit a broadcaster receives from its spectrum, the more benefit the public should receive as well.

To support these notions of what the public interest obligations of DAB should accomplish, the Coalition presents four main arguments in these reply comments. First, we disagree with commenters who state that the Commission should not establish any public interest framework for digital audio broadcasting (DAB). The Commission should immediately establish a basic public interest scheme to apply to DAB. A digital broadcaster’s duty to provide programming responsive to the needs of its community of service is far too important to leave to the market. A broadcaster has a fundamental obligation to air programming responsive to the needs of its community. Clear guidelines setting forth public interest obligations will ensure that the public has access to the programming necessary to be informed and active citizens.

Second, the Coalition specifically disagrees with the suggestions of some commenters that the political programming requirements in Sections 312 and 315 should not apply to every stream transmitted by a licensee. Sections 312 and 315 provide candidates with vital access to broadcasting in order to run effective, efficient campaigns and provide the electorate with important information about elections and other issues of political import. We agree with other

commenters that these requirements are so vital that the Commission should ensure that they apply to every DAB stream.

Third, any subleased broadcast streams should be treated like existing broadcast streams with respect to Commission regulations. The Commission should either treat the subleasee as a full licensee or ensure that the original licensee remains responsible for ensuring that the subleasee complies with FCC rules. The Commission should also take action to encourage the presence of underrepresented groups and non-station licensees on the public airwaves to increase diversity.

Fourth, allowing the market to govern the speed of the transition and sound quality of digital audio is appropriate for DAB. Allowing market forces to guide the speed of transition to digital radio will allow stations to transition at a pace dictated by their own markets and finances. Authorizing multicasting will also allow stations to experiment with new formats and potentially provide a more diverse selection of programming to its listeners. Moreover, while the Commission should ensure that every broadcaster provides at least one free audio stream that highest quality transmitted by the particular broadcaster, it should not mandate the maximum number of multicast channels or minimum quality levels that a licensee must broadcast.

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The organizations listed above (“Public Interest Coalition” or “Coalition”) by their attorneys, the Institute for Public Representation and the Media Access Project, respectfully submit these comments in reply to comments filed in the above referenced proceeding.

**I. THE FCC SHOULD ACT NOW TO ESTABLISH A PUBLIC  
INTEREST FRAMEWORK FOR DAB.**

Several commenters suggest that the Commission should not act on public interest obligations for digital audio broadcasting (“DAB”) until after services are fully deployed.<sup>1</sup> However, a digital broadcaster’s duty to provide programming responsive to the needs of its community of service is far too important to leave to the vicissitudes of the market. A broadcaster has a fundamental obligation to air programming responsive to the needs of its

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<sup>1</sup> See *Comments of National Association of Broadcasters* at 17; *Comments of Infinity Broadcasting* at 5; *Comments of Cox Radio* at 3-4; *Comments of Clear Channel* at 5.

community,<sup>2</sup> and the Commission has a statutory obligation to ensure broadcasters fulfill their obligations. Clear guidelines setting forth public interest obligations will ensure that members of the public have access to the programming necessary to be informed and active citizens of their communities.

**A. Now Is The Appropriate Time For The FCC To Begin To Develop Public Interest Obligations For DAB.**

Now is time for the Commission to set the ground rules for the service that digital audio broadcasters should provide to the public. Broadcasters are charged with informing the citizens of their communities about issues of local and national importance. This responsibility is fundamental. Digital audio broadcasters will be able to reap the rewards of increased capacity from the early stages and must, from the outset, increase their service as public trustees of the airwaves in a parallel manner. Technological innovation is a constant fact of life in communications; it is not a reason for the Commission to decline to adopt baseline public interest obligations for DAB.

Contrary to the arguments of some commenters, defining digital broadcasters' public interest obligations will neither stifle development of innovative services nor retard deployment. It is more equitable to broadcasters and the communities they serve to determine from the beginning exactly what will be expected from digital broadcasters in the near future. If the Commission adopts rules now, broadcasters will be better able to plan to meet their obligations. As one broadcaster has noted, "[i]n return for a license to use a public asset for private financial gain, a broadcaster agrees to serve the public interest . . . *As with all contracts, both parties to the*

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<sup>2</sup> The importance of broadcasters covering significant local issues stems from the long-standing principle that because broadcasters are licensed to use a limited public space (the spectrum), they should in turn serve the public as trustees of the spectrum. *See* 47 U.S.C. § 307(b); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969).

*agreement need to know exactly the responsibilities that they have to each other.”*<sup>3</sup> With the knowledge of what is expected from them up front, digital audio broadcasters can tailor their use of the spectrum accordingly. This is preferable to imposing public interest obligations after digital audio broadcasting practices have become entrenched.

Clear rules will also make the license renewal process more meaningful and certain. Adopting specific guidelines to ensure that broadcasters meet their obligations to their communities would enable the Commission to adequately determine whether a broadcaster’s license has met the standards for renewal. Specific guidelines would therefore give substance to the Congressional requirement that broadcasters serve their local communities.<sup>4</sup>

In addition, licensees that transition to DAB will use additional sideband spectrum, and therefore should offer additional services to the public.<sup>5</sup> The Commission should not ask the public to wait for the public service owed to it by digital broadcasters while digital broadcasters reap the rewards of new programming capabilities, financial opportunities, and use of spectrum sidebands that were previously unused.

**B. Digital Audio Broadcasters That Choose To Use Increased Capabilities For Subscription And Other Revenue-Enhancing Services Must Be Subject To Increased Public Interest Obligations.**

The Coalition has proposed that in addition to minimum public interest obligations for digital audio broadcasters, the Commission should impose additional public interest obligations when a licensee chooses to use its capacity to offer subscription and other revenue-enhancing

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<sup>3</sup> Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* (1998) (“Advisory Committee Report”), Separate Statement of James Goodmon at 86 (emphasis in original).

<sup>4</sup> See 47 U.S.C. §§ 307(c), 309(k) (2001).

<sup>5</sup> See *Comments of Public Interest Coalition* at 17-19.

services.<sup>6</sup> Cox Radio argues that digital audio broadcasters should be permitted to offer subscription services and the only new restriction on those services should be that stations must provide at least one free over-the-air audio stream.<sup>7</sup>

While the Coalition agrees that every station must continue to provide at least one free over-the-air audio stream of the highest quality broadcast by the licensee whether or not that station chooses to offer subscription services,<sup>8</sup> that limited proposal will not ensure that the public receives appropriate benefit from the new technology. Stations that choose to offer subscription and other revenue-enhancing services, rather than offer additional free, over-the-air audio or data services, will reap increased benefits and therefore should offer commensurate benefits to the public.<sup>9</sup> To be clear, the Coalition does not argue that broadcasters cannot choose to use the digital capacity to offer subscription and other revenue-enhancing services; but stations that choose to use the capacity this way must also accept additional public interest obligations. The Coalition's comments have proposed a practical, effective and flexible menu system to allow digital broadcasters to tailor their additional public interest services to their markets, formats, and specific community needs.<sup>10</sup>

**C. Minimum Public Interest Obligations, Including Localism Requirements, Do Not Constitute Unconstitutional Requirements on Broadcasters.**

State Broadcasters present unsubstantiated arguments that localism requirements are contrary to the public interest and the First Amendment because they stifle the distribution of

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<sup>6</sup> See *Comments of Public Interest Coalition* at 47-62.

<sup>7</sup> See *Comments of Cox Radio* at 6.

<sup>8</sup> See *infra* section IV(c).

<sup>9</sup> See *Comments of Public Interest Coalition* at 47-62.

<sup>10</sup> *Id.*



national public affairs channels.<sup>11</sup> State Broadcasters and other commenters may wish that through repetition, their hopes will become reality. However, as discussed below, the courts have repeatedly rejected these arguments. Minimum local and political programming obligations further the First Amendment rights of the public. Such obligations are reasonable, and thus, would not unconstitutionally interfere with the rights of broadcasters to use the limited spectrum.

The justification for placing programming conditions on licensees lies within the First Amendment itself. “It is the rights of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>12</sup> As *Red Lion* explained, the public has a First Amendment right to information concerning such primary issues as local public affairs and political discourse.<sup>13</sup> As numerous scholars have also explained, the government can play a role in promoting public debate and democratic goals consistent with the First Amendment.<sup>14</sup> Moreover, broadcasters utilize limited spectrum and the law requires public interest obligations in exchange.

Minimum local and political programming obligations directly further the First Amendment rights of the American public and are therefore constitutional.<sup>15</sup> Such obligations

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<sup>11</sup> See *Comments of the Named State Broadcasters Associations* (“*State Broadcasters*”) at 14.

<sup>12</sup> *Red Lion*, 395 U.S. at 390.

<sup>13</sup> *Id.*

<sup>14</sup> See generally Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1997); Cass Sunstein, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Harry Kalven, Jr., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988); Lee Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 7 U. MICH. J.L. REV. 1 (1976); Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Zechariah Chafee, Jr., *FREE SPEECH IN THE UNITED STATES* (1941).

<sup>15</sup> The foundation of the broadcast licensing system is premised on affording “each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern.” See *Turner I*, 512 U.S. at 663 (citations omitted). “The importance of local broadcasting can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation’s population.” *Id.* Accordingly,

have been repeatedly upheld by the courts. For example, in *Time Warner*, the D.C. Circuit applied *Red Lion*'s relaxed standard of scrutiny to broadcasting, and upheld a statutory requirement that DBS operators set-aside a specified percentage of their channel capacity for noncommercial educational and informational programming.<sup>16</sup> The court relied on the fact that the DBS set-aside furthered the “right of the public to receive suitable access to social, political, esthetic, moral and other ideas.”<sup>17</sup> The DBS set-aside also promoted a “diversity of views and information,” an “interest [that] lies at the core of the First Amendment.”<sup>18</sup> As in the DBS set-aside, local programming and political programming obligations are constitutional because they directly seek to accomplish similar goals. The Coalition’s proposals promote a wide availability of information about public affairs and political issues that is essential to the welfare of the American public.<sup>19</sup>

While the higher standard of scrutiny does not apply, the court in *Time Warner* found that the DBS set-aside not only passed constitutional muster under the relaxed scrutiny of *Red Lion*, but that it would survive a higher level of scrutiny because it was not content-based.<sup>20</sup> The

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requiring digital audio broadcasters to air a minimum amount of local programming directly furthers the basis for which broadcasters were awarded the license in the first place.

<sup>16</sup> *Time Warner Entertainment v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (“*Time Warner*”).

<sup>17</sup> *Id.* at 975 (quoting *Red Lion*, 395 U.S. at 390).

<sup>18</sup> *Id.* at 976.

<sup>19</sup> See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1997) (“*Turner I*”) (“‘it has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”’”). *Id.* at 663 (citations omitted); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“speech concerning public affairs is . . . the essence of self-government”); *CBS v. FCC*, 453 U.S. 367, 396 (“[w]e have recognized that ‘it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day’”) (citations omitted); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office”).

<sup>20</sup> See *Time Warner*, 93 F.3d at 977.

crucial fact was that the DBS set aside did not “dictate the specific content of the programming that DBS operators are required to carry.”<sup>21</sup> Like the DBS set-aside, local programming and political discourse obligations would not dictate specific programming content. These recommendations “do not require or prohibit the carriage of particular ideas or points of view.”<sup>22</sup> Nor do they penalize broadcasters “because of the content of their programming.”<sup>23</sup> The Coalition’s proposals leave the broadcaster free to determine what content it will air to meet the guidelines and offer the flexibility to tailor public interest services to the broadcaster’s specific community tastes and needs.

The National Association of Broadcasters (“NAB”) also makes a weak attempt to question the FCC’s authority by suggesting that *MPAA v. FCC*<sup>24</sup> may put the FCC’s ability to establish public interest obligations “in doubt.”<sup>25</sup> It does not. In *MPAA*, the court found that there was a statutory limitation on the Commission’s ability to create the video description rules that altered creative content because Congress authorized a report about video description, but did not authorize the adoption of regulations in this new area.<sup>26</sup> In that case, the Commission encountered 1) a new area of regulatory involvement, 2) content-intrusive regulations, and 3) statutory limitations on the agency’s role.

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<sup>21</sup> *Id.* at 977; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (“*Turner II*”) (upholding “must-carry” rules of the 1992 Cable Act requiring cable operators to carry local broadcast programming because the rules were content neutral, promoted the important government interests of preserving local broadcasting, and did not burden more speech than was necessary to further that interest).

<sup>22</sup> *Time Warner*, 93 F.3d at 977 (citing *Turner I*, 512 U.S. at 647).

<sup>23</sup> *Id.*

<sup>24</sup> *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). (“*MPAA*”).

<sup>25</sup> *Comments of NAB* at 20-21.

<sup>26</sup> *See MPAA*, 309 F.3d at 799-800.

Public interest regulations on digital audio broadcasting are not comparable to the problems the court had with the video description rules in *MPAA*. First, public interest regulation of broadcasting is a well-established area of Commission authority and has been accepted and endorsed by Congress and the Supreme Court for decades.<sup>27</sup> Second, political and local programming obligations are not content-intrusive regulations. In *MPAA*, video description rules resulted in the creation of a new script. In contrast, political and local programming obligations provide flexible, content-neutral options for a broadcaster to tailor its broadcasting and service to its individual community. Third, there is no statutory limitation on the Commission's ability to create rules that serve the public interest. *MPAA* did not affect longstanding public interest regulations and did not change the Commission's legal authority to implement broadcasters' traditional Title III obligations. To accept the NAB's argument would start the FCC down a slippery slope leading to an incapacitated Commission with little ability to regulate broadcasting in the public interest.

## **II. POLITICAL BROADCASTING REQUIREMENTS APPLY TO EVERY AUDIO AND DATA STREAM TRANSMITTED BY DIGITAL AUDIO BROADCASTERS.**

The comments in this proceeding provide a wide variety of arguments regarding how to apply the political programming rules in Sections 312 and 315 to digital audio broadcasting. The Coalition argued that political broadcasting requirements of Sections 312 and 315 should apply to every transmission that digital audio broadcasters produce, including all free and paid audio

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<sup>27</sup> The Supreme Court has acknowledged that the First Amendment rights of the public, not of the broadcasters, are paramount. *Red Lion*, 395 U.S. at 390. Thus, as the Supreme Court has historically recognized, the FCC has the authority and duty to make certain that broadcasters serve the public interest by creating policies that ensure that the public receives adequate local and political programming.

and data services.<sup>28</sup> NAB states that Sections 312 and 315 should apply to primary and secondary free over-the-air streams.<sup>29</sup> The State Broadcasters argue that Section 312 should not apply to new streams but Section 315 should.<sup>30</sup> Cox Radio argues that the right of access is only to a station, and not to any particular broadcast stream, so broadcasters can meet their statutory obligations by providing access to the main channel.<sup>31</sup>

Section 315(a) of the Communications Act requires a broadcaster that permits any political candidate to use its facilities to provide equal opportunities to all other such candidates for that office.<sup>32</sup> In its comments, the Coalition argued that any use by a candidate of any program service provided by a digital audio broadcaster triggers a competing candidate's rights, and the licensee must then provide any competing candidate for that office an equal opportunity to use that service. A contrary application of the statute would allow broadcasters to discriminate among candidates for the same office.

NAB's proposal to limit equal opportunities to free audio streams would be unfair to candidates and would deprive the public of important information. For example, a station with a subscription audio channel that airs primarily political programming targeted at politically active

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<sup>28</sup> See *Comments of Public Interest Coalition* at 31-36.

<sup>29</sup> *Comments of NAB* at 18. Cox Radio may also agree with the application of Sections 312 and 315 to all free over-the-air audio channels, but their comments in this area are not clear. See *Comments of Cox Radio* at 8-9 (first stating that "main channel" access is adequate to satisfy the rules, then saying that the FCC should use the same facts and circumstances test it usually does to consider reasonable access claims").

<sup>30</sup> *Comments of State Broadcasters* at 15 (stating that "if a licensee or broker chooses to grant non-exempt access to legally qualified candidates . . . then the equal opportunities and lowest unit charge provisions of Section 315 should apply."). The Coalition also stresses its proposals to strengthen lowest unit charge rules including requiring written and clear disclosure of make good policies so that candidates understand their rights, implementing rules that restrain broadcasters from increasing the lowest unit charge during an election, and clarifying that the FCC's lowest unit charge rules apply to both multicasting and subscription services. See *Comments of Public Interest Coalition* at 34.

<sup>31</sup> *Comments of Cox Radio* at 8.

<sup>32</sup> 47 U.S.C. § 315(a).

adults could grant several hours of access to a Democrat running for city council, but refuse time to a Republican running for the same office. In fact, under NAB's proposal, the Republican would not even have a right to access the main channel since the Democrat spoke on a subscription channel and did not trigger Section 315.

Section 312(a)(7), which requires broadcasters to provide federal candidates with "reasonable access" to their facilities during political campaigns, should also apply to all digital audio broadcasting streams and services. A digital broadcaster who refuses to sell or give time to a candidate on its ancillary pay service or agrees to sell time to a candidate only on the licensee's less popular channels, impermissibly interferes with the candidate's rights of access. Such a practice is unreasonable and therefore unlawful under § 312(a)(7).<sup>33</sup> "Section 312(a)(7) . . . makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."<sup>34</sup> If broadcasters are allowed to exclude political advertising and programming from certain audio streams, candidates may not be able to reach certain listeners and those listeners will not be able to intelligently evaluate candidates' positions on vital public issues before voting. After the DAB transition, radio listeners may change their listening habits and it is possible that a significant number of people will not listen to a broadcasters main channel. The FCC "admonish[es] broadcasters not to 'second guess' the 'political' wisdom or . . . effectiveness of the particular format sought by a candidate."<sup>35</sup> It would be inconsistent to

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<sup>33</sup> *Becker v. FCC*, 95 F.3d 75, 83 (D.C. Cir. 1996) (citing *CBS*, 453 U.S. at 389). *Becker* also states that if a licensee channels one candidate's message to "prime time" and the second candidate to "broadcasting Siberia," the latter would be denied the equal access. In the same way, licensees could relegate a candidate to the "broadcasting Siberia" of a stream that does not have the same type of audience as another stream accessed by another candidate. *Id.*

<sup>34</sup> *Id.* at 396.

<sup>35</sup> *CBS v. FCC*, 453 U.S. 367, 389 (1981) (citing 74 F.C.C.2d at 667-668).

allow DAB providers to make blanket rules that deny political candidates access to some audio streams before they hear the political candidates' requests.

Cox Radio specifically asserts that the FCC should not adopt political broadcast rules for DAB because the statute only requires access to the "broadcasting station," not to any particular audio stream."<sup>36</sup> However, Cox provides no support for this strained reading of the statute. At time the statutes were adopted, the broadcast capacity contemplated by legislators was one single audio stream per broadcast station. Thus, candidates were granted access rights to the entirety of the broadcast services offered by a station. There is no reason to now believe that intention has changed and that the Commission should not clarify that Sections 312 and 315 continue to apply to the entire broadcast capacity of a station.

The State Broadcasters similarly argue that the Commission should not apply Section 312(a)(7) to newly created multicast channels because those channels may be used for targeted programming that is incompatible with electioneering, such as children's programming.<sup>37</sup> This argument is a strawman based on irrational assumptions. Every format potentially has listeners that a candidate may want to reach. For example, children's programming is also heard by parents who vote and they might prefer certain candidates because of their positions on issues affecting children. While the State Broadcasters might not envision a reason to place political advertising in children's channels, the law dictates it is the purview of candidates, not broadcasters, to decide how to target their political programming.<sup>38</sup> Moreover, since no one

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<sup>36</sup> *Comments of Cox Radio* at 8-9.

<sup>37</sup> *Comments of State Broadcasters* at 15.

<sup>38</sup> *Becker*, 95 F.3d at 80. "[W]hile it is possible to visualize accommodations at the margin in which a political message is broadcast during school hours or the late, late evening when significantly fewer children are watching television, any such accommodation is apt to deprive a candidate of particular *categories* of adult viewers whom he may be especially anxious to reach. It is common knowledge that campaign strategists rely on survey research to target specific

knows the likely content of any channel, there is simply no guarantee that broadcasters will create these targeted channels, and it certainly offers no basis for a wholesale exclusion of digital channels from political programming requirements.<sup>39</sup>

### **III. SUBLEASED BROADCAST STREAMS SHOULD BE TREATED LIKE EXISTING BROADCAST STREAMS WITH RESPECT TO COMMISSION REGULATIONS.**

The Coalition largely agrees with State Broadcasters' discussion of brokering or subleasing additional capacity to non-licensees.<sup>40</sup> State Broadcasters also suggest that multicasting will allow additional niche services and offer access to underrepresented groups to the airwaves.<sup>41</sup> The Coalition agrees that the Commission should take action to encourage the presence of underrepresented groups and non-station licensees on the public airwaves to increase diversity. State Broadcasters admit that niche audiences largely go unserved in the present radio environment.<sup>42</sup> The Coalition agrees and points out that the present radio environment is

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voting groups with television advertisements. *See generally* Dan Koeppel, *The High-Tech Election (of 1992)*, Brandweek 18, Mar. 2, 1992. We can surmise, for example, that early shift factory workers whom a candidate wishes to reach are not apt to stay up beyond their normal bedtimes just to see his political advertisements. Thus, the ruling creates a situation where a candidate's ability to reach his target audience may be limited and his 'personal campaign strategies ... ignored.' *See CBS, Inc.*, 453 U.S. at 389." *Id.*

<sup>39</sup> The State Broadcasters also cite *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) ("NAB"), to argue that since DAB is a nascent technology, not applying Section 312 is appropriate and has precedent in the Commission's treatment of the satellite industry. *Comments of State Broadcasters* at 15. State Broadcasters neglect to mention, however, that the court vacated that part of the FCC Order that refused "to extend the broadcast restrictions of Title III of the Communications Act of 1934, as amended, to all DBS systems." *NAB* at 1199. "Among the statutory restraints that broadcasters currently face are section 312(a)(7) . . . and section 315." *Id.* at 1200. The court found that even though the Commission has discretion when regulating new technologies, "that discretion is not boundless: the Commission has no authority to experiment with its statutory obligations. We conclude that the Commission has engaged in precisely such forbidden statutory experimentation in exempting from Title III" certain DBS systems. *Id.* at 1200-01.

<sup>40</sup> *Comments of State Broadcasters* at 10-11.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 9-10.



evidence that general market forces are not sufficient to encourage the provision of content that is not widely popular. Even with the doubling of streams through the present multicasting proposal, insufficient capacity will exist to serve the needs of all would-be broadcasters and all listeners. The coalition therefore urges the Commission to consider a menu approach as described in our comments that will encourage the provision of diverse content from diverse sources, such as preferential treatment for small disadvantaged businesses.<sup>43</sup>

State Broadcasters' comments also generally comport with the Coalition's discussion of the appropriate treatment of subleased or brokered program streams. The Public Interest Coalition agrees that the Commission should either treat the subleasee as a full licensee of the Commission subject to its public interest obligations or the Commission should ensure that the original licensee remains responsible for ensuring the subleasee complies with the Commission's rules.<sup>44</sup> The Commission should ensure that each program stream is governed by the Commission's rules and that one entity is clearly accountable for ensuring compliance, complete with repercussions for noncompliance. The Coalition also supports a process for approving such sublease agreements that is relatively simple and straight-forward.<sup>45</sup>

State Broadcasters' recognition of the possible diversity benefits of additional audio streams, however, is not consistent with their advocacy of increases in ownership limits.<sup>46</sup> The Public Interest Coalition emphasizes that subleased streams should be treated as attributable ownership interests under the Commission's ownership rules.<sup>47</sup> Therefore, while the Coalition does not oppose, *per se*, leasing broadcast streams to existing licensees as suggested by the State

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<sup>43</sup> *Comments of Public Interest Coalition* at 57-58.

<sup>44</sup> *Comments of Public Interest Coalition* at 54-59.

<sup>45</sup> *See Comments of Public Interest Coalition* at 55; *Comments of the State Broadcasters* at 10.

<sup>46</sup> *See Comments of the State Broadcasters* at 12.

<sup>47</sup> *Comments of Public Interest Coalition* at 58-59; *cf. Comments of Clear Channel* at 3-4.

Broadcasters,<sup>48</sup> we stress that these leasing arrangements contribute nothing toward diversity and thus should not be counted as such, and should be subject to the ownership rules. Therefore subleasing should not be allowed to permit a licensee that owns the maximum number of stations in a particular market to acquire additional broadcast streams. The Public Interest Coalition strongly oppose any relaxation of the ownership rules because of the introduction of additional digital radio signals.<sup>49</sup> If the Commission uses the introduction of additional streams to justify ownership, it would undermine the potential diversity benefits that the new technology could bring. If the Commission doubles the number of available streams, but permits a corresponding increase in concentration of radio ownership, all of the diversity benefits will be lost. No new content creators will reach the public. The resulting ownership percentages will remain essentially the same.

#### **IV. NON-PROGRAMMING REQUIREMENTS FURTHER SUPPORT THE PUBLIC INTEREST**

##### **A. The FCC Should Authorize Multicasting And Allow Market Forces To Guide The Speed Of Transition.**

The Coalition agrees with NPR's request that the Commission authorize multicasting.<sup>50</sup> Multiple audio streams have the potential to increase diversity of formats, programming, and the availability of news and public affairs programming for local communities. As NPR's Tomorrow Radio testing has already shown, supplemental audio channels can be implemented immediately.<sup>51</sup> The Coalition agrees with NPR's further assertion that multicast capability should be authorized because it will allow stations to provide services related to security

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<sup>48</sup> *Comments of State Broadcasters* at 12.

<sup>49</sup> *See, e.g., Comments of State Broadcasters* at 12.

<sup>50</sup> *See Comments of NPR* at 2-8.

<sup>51</sup> *Id.* at 2-4.

concerns, local, regional and national events, assisted living services, foreign language services, local public affairs, and service to minority communities.<sup>52</sup>

The State Broadcasters argue that while the Commission should authorize multicasting, it should refrain from applying public interest obligations to this new capability of DAB.<sup>53</sup> The Coalition disagrees. The availability of multiple streams alone is not enough; other obligations that work in tandem with the increased capacity of DAB will help to ensure that the public interest is served in a parallel manner. Stations that multicast will have two times the programming capacity, and perhaps even more in the future, and the amount of public interest programming should also increase. It makes little sense to allow a programmer that previously broadcast 24 hours, 2 of which were public interest-oriented hours, to now broadcast 48 hours of programming and remain stagnant at 2 hours of public interest programming. Unless public interest programming increases, the new technology will not adequately serve the public. In fact, the public will experience a decrease in the net percentage of available public interest programming. The FCC should create a mechanism to increase the public interest programming obligations of multicastrs such as the programming guidelines suggested by the Coalition in its comments.<sup>54</sup> The Coalition suggests that the Commission establish minimum programming guidelines for the primary audio stream and additional requirements for other DAB streams. The guidelines would focus on local civic and electoral affairs programming and locally originated programming.<sup>55</sup>

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<sup>52</sup> *Id.* at 6-7.

<sup>53</sup> *Comments of State Broadcasters* at 6, 8.

<sup>54</sup> *See Comments of Public Interest Coalition* at 25-28.

<sup>55</sup> *Id.*

The Coalition also agrees with commenters who urge the Commission to allow the market to determine the speed of DAB transition.<sup>56</sup> Individual broadcasters should have the flexibility to explore this new technology (and invest in the new equipment) at their own pace.

**B. Multicast Audio Channels Must Have Distinct Station Identifiers To Allow Consumers To Identify The Audio Or Data Stream To Which They Are Tuned.**

Some commenters argue that multicast digital streams do not require separate station identifiers.<sup>57</sup> While the Coalition does not believe that each stream requires its own call letters, we believe that some standardized expanded form of call letters should be used to identify individual streams. Call letters are an important mechanism the public and the FCC use to identify particular broadcast streams. If, for example, a listener is exposed to what she perceives as indecent content on the radio, she needs a method to identify the particular stream that aired the offending material.

State Broadcasters insist that increased station identification requirements are unnecessary because call letters can be embedded into the bit-stream of a channel with new DAB capabilities, permitting visual identification of a licensee.<sup>58</sup> This rationale actually serves to describe the ease with which DAB will be able to transmit easily an expanded call sign or station identifier. State Broadcasters also argue that stations now identify themselves, their call sign, identifier slogan, community of license, and dial position, so further station identification requirements are not needed to ensure listener identification.<sup>59</sup> State Broadcasters fail to take into account that listeners must be able to identify the particular programming stream in an

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<sup>56</sup> See *Comments of iBiquity* at 5, *Comments of State Broadcasters* at 6-7, *Comments of Infinity Broadcasting* at 3-4, *Comments of Cox Radio* at 2, *Comments of Clear Channel* at 2.

<sup>57</sup> See *Comments of State Broadcasters* at 16, *Comments of Clear Channel* at 5, *Comments of Infinity Broadcasting* at 7.

<sup>58</sup> See *Comments of State Broadcasters* at 16.

<sup>59</sup> *Id.*

environment where one licensee may control multiple audio and data streams. Station marketing and branding is not enough for a listener when she tries to communicate with the Commission regarding where she heard an indecent broadcast or other rule violations. An expanded station identification system will help identify which particular show, advertisement, radio personality, or other offending programming resulted in a listener complaint.

**C. While the Commission Should Ensure That Every Broadcaster Continues To Provide At Least One Free Audio Channel, It Should Not Place Limits On The Number Of Channels.**

The Coalition agrees with some commenters' assertions that the Commission should refrain from regulating the number of streams and minimum audio quality of HD Radio.<sup>60</sup> Because DAB's capability to create multiple broadcast streams remains unpredictable, it is premature for the Commission to establish a maximum number of streams that a station may use. On the other hand, the Commission should minimally require that each station must continue to provide one free over-the-air audio stream. That stream should consist of the highest audio quality that the station offers to its audience.<sup>61</sup>

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<sup>60</sup> See e.g. *Comments of iBiquity* at 13, *Comments of State Broadcasters* at 6.

<sup>61</sup> It is fitting for radio stations to experiment with the appropriate capacity dedicated to different formats. See *Comments of iBiquity* at 13.

## CONCLUSION

We respectfully request that the Commission take action in accordance with the views and proposals submitted in these Reply Comments and in the Coalition's Comments in this proceeding.

Respectfully Submitted,

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/s/

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